

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SCOTT HARGIS d/b/a SCOTT
HARGIS PHOTO, an individual,

Plaintiff,

v.

PACIFICA SENIOR LIVING
MANAGEMENT LLC, a California
limited liability company, and DOES 1
through 10,

Defendant.

Case No. 2:22-cv-06989-MCS-PD

**ORDER RE: PARTIES' CROSS-
MOTIONS FOR SUMMARY
JUDGMENT (ECF Nos. 30–31) AND
DEFENSE COUNSEL'S MOTION TO
WITHDRAW (ECF No. 40)**

Plaintiff Scott Hargis, doing business as Scott Hargis Photo, brought this suit alleging Defendant Pacifica Senior Living Management LLC willfully infringed his copyright in 43 photographs (the “disputed photographs”). (Compl., ECF No. 1.) Defendant moves for summary judgment that any infringement was not willful, that there are only seven works in dispute (as that term is used in the Copyright Act),¹ and

¹ As discussed in greater detail below, Defendant argues that photographs taken at each location constitute a single “work” as that term is used in the Copyright Act. Because

1 that Defendant had an implied license to use the photographs. (Def.’s Mot, ECF No.
2 30-1.) Plaintiff opposed the motion, (Pl.’s Opp’n to Def.’s Mot, ECF No. 36), and
3 Defendant replied, (Def.’s Reply, ECF No. 37).

4 Separately, Plaintiff moves for summary judgment that Defendant willfully
5 infringed his copyrights in the disputed photographs. (Pl.’s Mot., ECF No. 31-1.)
6 Defendant filed an opposition, (Def.’s Opp’n to Pl.’s Mot., ECF No. 35), and Plaintiff
7 replied, (Pl.’s Reply, ECF No. 38).

8 Finally, Defendant’s counsel Gordon & Rees Scully Mansukhani LLP
9 (“GRSM”) moves to withdraw as counsel for Defendant. (Withdrawal Mot., ECF No.
10 40-1.) Plaintiff does not oppose this motion. (*Id.* at 3.)

11 The Court deems these motions appropriate for decision without oral argument.
12 Fed. R. Civ. P. 78(b); C.D. Cal. R. 7-15. The Court takes off calendar the hearing on
13 Defendant’s counsel’s motion to withdraw set for August 21, 2023.

14 **I. EVIDENTIARY ISSUES**

15 Plaintiff objects to certain documents attached to the Brown declaration as
16 lacking proper authentication or foundation. (Pl.’s Objections ¶¶ 5–12, ECF No. 36-8.)
17 The Court also notes that the documents are not presented in a manner compliant with
18 the Court’s Initial Standing Order. (*See* Initial Standing Order § 10(c)(ii), ECF No. 10
19 (“Documentary evidence as to which there is no stipulation regarding foundation must
20 be accompanied by the testimony, either by declaration or properly authenticated
21 deposition transcript, o[f] a witness who can establish authenticity.”).)

22 _____
23
24 one of the properties at issue was at various times referred to as “Menifee” and “Sun
25 City,” “there was confusion on Pacifica’s side as to whether the ‘Menifee’ and ‘Sun
26 City’ properties were the same or different, as Pacifica’s Menifee property is located in
27 Sun City.” (Def.’s Reply 2 n.1, ECF No. 37.) Although Defendant’s motion argues the
28 number of “works” is eight, Defendant’s reply brief clarified that there are only “seven
properties that used the Photos” and thus “seven, not eight, is the proper number of
works.” (*Id.*) Accordingly, the Court evaluates Defendant’s motion as if it claims the
number of works is seven and not eight.

1 Given the *extreme* sanctions that would be imposed if these documents were false
2 or submitted with the knowledge they were inadmissible evidence, the Court believes
3 judicial economy is best served by considering the proffered evidence as if it were
4 admissible. This does not, however, excuse Defendant from its obligation to properly
5 authenticate and establish a foundation for documents offered in support of its motion.
6 **Accordingly, Defendant shall submit substantiating declarations within seven days of**
7 **the date of this Order. Failure to comply with this order will result in the imposition**
8 **of financial and/or terminating sanctions.**

9 The Court concludes that it need not resolve many of Plaintiff's remaining
10 objections at this time. To the extent the Court relies on the objected-to evidence not
11 discussed above, the relevant objections are OVERRULED. *See Burch v. Regents of*
12 *Univ. of Cal.*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006).

13 **II. BACKGROUND**

14 "Plaintiff is an interior and architectural photographer." (Pl.'s Statement of
15 Genuine Disputes ("PSGD") ¶ 1, ECF No. 36-6.) Atria Management Co. ("Atria")
16 hired Plaintiff to take photographs of seven "Atria senior living facilities" located in
17 "Burlingame, Fresno, Sun City, . . . Sterling, Rancho Penasquitos, Encinitas, and Chula
18 Vista" (the "Atria properties"). (*Id.* ¶ 5.) Atria displayed the 43 disputed
19 "[p]hotographs on its websites for marketing of properties in order to entice customers
20 to view, visit, and potentially become residents," (*Id.* ¶ 9; *see id.* ¶ 2), pursuant to "non-
21 exclusive license[s] to Atria Senior Living[] and HCP Inc." which were "not
22 transferable" and for which "[t]hird-party usage . . . [was] not granted," (Hargis Decl.
23 Ex. C ("Atria Invoices"), ECF No. 31-11). "The Photos are subject to two [copyright]
24 registrations, VA 2-140-916 and VA 2-174-022," both of which are held by Plaintiff.
25 (PSGD ¶ 3; Naylor Decl. Ex. A ("Registration Statements"), ECF No. 31-13.)

26 "Throughout 2020 and 2021, Pacifica bought [the] seven senior living facilities"
27 depicted in the disputed photographs "from Atria or Atria-related entities." (PSGD
28 ¶¶ 14–15.) Following its acquisition of the Atria properties, Defendant displayed the

1 disputed photographs “on its websites for the seven facilities,” (*id.* ¶ 22), which “were
2 designed by third party company G5,” (*id.* ¶ 18).

3 On March 30, 2021, Joseph Naylor emailed Defendant on behalf of ImageRights
4 International (“ImageRights”), which is “a copyright and licensing agent to professional
5 photographers, photo agencies, media companies and publishers who discover
6 unlicensed uses of their works.” (Naylor Decl. Ex. C (“ImageRights email”), ECF No.
7 31-15.) The ImageRights email claimed that “Scott Hargis’s copyrighted
8 images . . . were discovered on the website www.pacificameniffee.com” and that
9 ImageRights possessed “no record of a license.” (*Id.*) The email identified 16 images
10 by their “Image IDs” (e.g., “hargis_180613_7290”). *Id.* The same day the email was
11 sent, “Pacifica’s marketing director Lucie Punches forwarded the Image Rights [sic]
12 email to Collin Foote, who works for Pacifica’s web designer G5.” (PSGD ¶ 28.) A
13 series of email exchanges between G5 and Defendant’s legal counsel followed as
14 Defendant attempted to discern whether Mr. Naylor’s email was legitimate or “spam.”
15 (*Id.* ¶¶ 28–31.) “On April 12, 2021, Ms. Punches requested G5 remove the images from
16 the websites.” (*Id.* ¶ 32.) On April 19, 2021, Brian Nord, Defendant’s insurance and
17 claims adjuster, again directed Ms. Punches to “remove the images” and not use “them
18 in any additional media.” (*Id.* ¶ 36.) On April 26, 2021, Ms. Bringman, an ImageRights
19 representative, confirmed that it appeared the 16 images had been removed from the
20 website but noted that “they [were] still on the server for the website.” (*Id.* ¶ 39 (internal
21 quotation marks omitted).) On May 3, 2021, Ms. Bringman acknowledged that
22 Defendant “‘acted promptly’ to remove the images from [its] website.” (*Id.* ¶ 43 (citing
23 Brown Decl. Ex. 4, at SHP000205, ECF No. 30-7).)

24 Plaintiff filed the instant suit on September 27, 2022, contending that Defendant
25 infringed his copyright in all 43 of the disputed photographs. (Compl. ¶¶ 10, 13, 15.)
26 Defendant moves “for summary judgment or partial summary judgment on the
27 following grounds: (1) Pacifica did not engage in ‘willful’ infringement; (2) that the
28 number of copyrighted ‘works’ is [seven]; and/or (3) that Pacifica permissibly used the

1 photos under an implied license.” (Notice of Def.’s Mot., ECF No. 30.) Plaintiff cross-
2 moves for summary judgment on the basis that Defendant is liable for willful copyright
3 infringement. (Pl.’s Mot. 2.)

4 **III. LEGAL STANDARD FOR SUMMARY JUDGMENT MOTIONS**

5 Summary judgment is appropriate where there is no genuine issue of material
6 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
7 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when,
8 under the governing law, the resolution of that fact might affect the outcome of the case.
9 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine “if the
10 evidence is such that a reasonable jury could return a verdict for the nonmoving party.”
11 *Id.* The burden of establishing the absence of a genuine issue of material fact lies with
12 the moving party, *see Celotex*, 477 U.S. at 322–23, and the court must view the facts
13 and draw reasonable inferences in the light most favorable to the nonmoving party, *Scott*
14 *v. Harris*, 550 U.S. 372, 378 (2007). To meet its burden,

15 [t]he moving party may produce evidence negating an
16 essential element of the nonmoving party’s case, or, after
17 suitable discovery, the moving party may show that the
18 nonmoving party does not have enough evidence of an
19 essential element of its claim or defense to carry its ultimate
20 burden of persuasion at trial.

21 *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1106 (9th Cir.
22 2000). Once the moving party satisfies its burden, the nonmoving party cannot simply
23 rest on the pleadings or argue that any disagreement or “metaphysical doubt” about a
24 material issue of fact precludes summary judgment. *Matsushita Elec. Indus. Co., Ltd.*
25 *v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). There is no genuine issue for trial
26 where the record taken as a whole could not lead a rational trier of fact to find for the
27 nonmoving party. *Id.* at 587.

28 “[W]hen parties submit cross-motions for summary judgment, each motion must

1 be considered on its own merits.” *Fair Hous. Council of Riverside Cnty., Inc. v.*
2 *Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (internal quotation marks omitted).
3 “In fulfilling its duty to review each cross-motion separately, the court must review the
4 evidence submitted in support of each cross-motion.” *Id.* Accordingly, while both
5 parties’ motions are considered in this Order, the Court analyzes each one
6 independently.

7 **IV. DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

8 **A. Willful Infringement**

9 “To prove ‘willfulness’ under the Copyright Act, the plaintiff must show (1) that
10 the defendant was actually aware of the infringing activity, or (2) that the defendant’s
11 actions were the result of ‘reckless disregard’ for, or ‘willful blindness’ to, the copyright
12 holder’s rights.” *Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 944
13 (9th Cir. 2011) (quoting *Island Software & Computer Serv., Inc. v. Microsoft Corp.*,
14 413 F.3d 257, 263 (2d Cir. 2005)). “A willfully blind defendant is one who takes
15 deliberate actions to avoid confirming a high probability of wrongdoing and who can
16 almost be said to have actually known the critical facts. By contrast, a reckless
17 defendant is one who merely knows of a substantial and unjustified risk of such
18 wrongdoing.” *Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 833 (9th Cir. 2019) (cleaned
19 up). A showing that the defendant was negligent, i.e., that the defendant “should have
20 known of a similar risk but, in fact, did not,” cannot support a finding of willful
21 infringement. *Id.* at 833–34.

22 “Generally, a determination as to willfulness requires an assessment of a party’s
23 state of mind, a factual issue that is not usually susceptible to summary judgment.”
24 *UMG Recordings, Inc. v. Disco Azteca Distribs., Inc.*, 446 F. Supp. 2d 1164, 1174 (E.D.
25 Cal. 2006) (internal quotation marks omitted). “However, where the relevant facts are
26 admitted or otherwise undisputed, willfulness can be appropriately resolved on
27 summary judgment.” *Id.* (citing *Peer Int’l Corp. v. Pausa Recs., Inc.*, 909 F.2d 1332,
28 1335–36 (9th Cir. 1990), and *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923, 936

1 (N.D. Cal. 1996)). “Willfulness need not be proven directly but may be inferred from
2 the defendant’s conduct.” *Id.* at 1173.

3 “To refute evidence of willful infringement, [the defendant] must not only
4 establish its good faith belief in the innocence of its conduct, it must also show that it
5 was reasonable in holding such a belief.” *Peer Int’l*, 909 F.2d at 1336. Thus, to succeed
6 on its motion, Defendant must present sufficient facts proving it reasonably believed it
7 had a right to display the disputed photographs.

8 Defendant offers two arguments in support of its contention that any infringement
9 was not “willful.” First, Defendant argues it “was operating under a reasonable belief
10 that it was using the Hargis images lawfully via its purchase from Atria, and that all
11 photographs on the websites designed by G5 were licensed.” (Def.’s Mot. 11.) Second,
12 Defendant claims the fact that it “‘acted promptly’ to remove the images from [its]
13 website once notified of them” shows that any infringement was not willful. (*Id.* at 12.)
14 As explained in greater detail below, Defendant is entitled to a determination that any
15 infringement of the 16 photographs identified in the ImageRights email was not willful.
16 Defendant is not entitled to summary judgment concerning the willfulness of any
17 infringement of the remaining disputed photographs.

18 1. *Prior to the ImageRights Email, Defendant Reasonably Believed It*
19 *Had a Right to Use the Disputed Photographs*

20 Defendant proffers two justifications for its claim that it reasonably believed it
21 had a right to use the disputed images, only one of which is supported by sufficient
22 evidence. First, Defendant claims that “Pacifica and G5’s policy was to use only
23 licensed images on the Pacifica websites.” (PSGD ¶ 20.) Defendant’s evidence in
24 support of this claim is limited to the declaration of Heather Smith. (*See id.* (citing
25 Smith Decl. ¶ 6, ECF No. 30-8).) Defendant produces no evidence of a written policy
26 or any other document (e.g., employee handbooks, internal emails, etc.) suggesting it
27 was company policy to use licensed images on its website. Further, given Plaintiff’s
28 photographs appeared on Defendant’s website without an express license, there is

1 reason to question whether the policy (assuming it existed) was ever followed in
2 practice. A policy is only as good as the paper it is written on if it is never followed or
3 disregarded at will.

4 Plaintiff has the ultimate burden of showing Defendant willfully infringed his
5 copyrights. *UMG Recordings, Inc.*, 446 F. Supp. 2d at 1173. Thus, to succeed in its
6 summary judgment motion that infringement was not willful, Defendant must “produce
7 evidence negating an essential element of [Plaintiff’s] case, or” showing that Plaintiff
8 “does not have enough evidence of an essential element of its claim . . . to carry its
9 ultimate burden of persuasion at trial.” *Fritz Cos., Inc.*, 210 F.3d at 1106. Specifically,
10 Defendant must produce evidence showing Plaintiff could not possibly show Defendant
11 had a reasonable and good faith belief that its use of the disputed photographs was
12 authorized. Defendant has not presented sufficient evidence that it maintained and
13 regularly abided by a policy of exclusively using licensed images on its website, thereby
14 giving rise to a reasonable belief that all images on its websites were authorized. Thus,
15 its motion for summary judgment cannot be granted on that basis.²

16 Defendant’s second argument is that “[i]n all prior acquisitions of properties from
17 any third party, Pacifica has always received from that party photos (including attendant
18 rights, licenses, and/or permissions to use the photos) of the property to use on the
19 community website, as contemplated and intended as part of the acquisition
20 transaction.” (PSGD ¶ 17.) Based on this, Defendant argues it “reasonably believed
21 that it had permission to use the photographs, as doing so was industry standard to use
22 a seller’s marketing material following the purchase of a property, and because Pacifica
23 had come into possession of the photographs, apparently via Atria.” (Def.’s Mot. 12
24

25 ² Plaintiff also objects to this evidence on the grounds that Defendant never identified
26 G5 as an entity likely to have discoverable information and failed to mention any policy
27 or contract in its initial disclosures. (Pl.’s Objections ¶¶ 3–4.) This constitutes an
28 independent basis to exclude consideration of any “policy” that G5 may have had with
respect to the use of licensed images. Fed. R. Civ. P. 37(c).

1 (citing PSGD ¶ 16).)

2 To support these assertions, Defendant cites its response to Plaintiff's
3 interrogatory requesting Defendant "[d]escribe in detail all efforts [it] made to secure
4 any licenses or rights for content such as photographs used on the Pacifica Websites."
5 (Brown Decl. Ex. 1, at 7, ECF No. 30-4.) While interrogatory responses alone may be
6 insufficient to establish a fact for the purposes of summary judgment, *see Carter v.*
7 *Clark County*, 459 F. App'x 635, 636 (9th Cir. 2011), Defendant's internal emails also
8 show that at the time it received the ImageRights email, Defendant believed it had a
9 right to display photographs of the properties it had purchased from Atria. Mr. Nord
10 wrote, "The photographer that [ImageRights] represent[s] lists Atria as one of their
11 clients on their website. When we purchase these facilities it should include these
12 photos. We purchased both of these facilities from Atria. So we should be able to get
13 this sorted out." (PSGD ¶ 31 (quoting Brown Decl. Ex. 2, at PACIFICA000078, ECF
14 No. 30-5).)

15 Taken together, the interrogatory response and the contemporaneous email show
16 that Defendant believed the purchase the Atria properties included "photos (including
17 attendant rights, licenses, and/or permissions to use the photos) of the property to use
18 on the community website." (PSGD ¶ 17.) Defendant has therefore provided sufficient
19 evidence demonstrating that before it received the ImageRights email, Defendant
20 honestly and "reasonably believed that it had permission to use the photographs."
21 (Def.'s Mot. 12.)

22 Plaintiff's evidence and arguments in opposition do not raise a genuine dispute.
23 First, Plaintiff argues that "Defendant relies solely on its own lawyer-drafted
24 interrogatory responses and nothing else." (Pl.'s Opp'n to Def.'s Mot. 2 (emphasis
25 removed).) As discussed above, Defendant's evidence is not limited to its interrogatory
26 response. Contemporaneous emails from Defendant's employees show that Defendant
27 honestly (if erroneously) believed that the right to use the disputed images was included
28 in the purchase from Atria. (*See* Brown Decl. Ex. 2, at PACIFICA000078.)

1 Plaintiff next points out that the express licenses under which Atria was
2 authorized to use the disputed photographs were “not transferable,” and expressly
3 precluded “third-party usage.” (Pl.’s Opp’n to Def.’s Mot. 4; *see* Atria Invoices.) From
4 this, Plaintiff claims that “Defendant’s complete failure to investigate in the face of such
5 express license language and clear law demonstrates willfulness.” (Pl.’s Opp’n to
6 Def.’s Mot. 4.) Plaintiff offers no evidence showing Defendant was actually aware of
7 the terms of the Atria Licenses before it received the ImageRights email. (*See* PSGD
8 ¶ 35 (leaving undisputed that ImageRights first provided Atria Invoices to Defendant
9 on April 19, 2021).) Nor does the record show that Defendant had any reason to suspect
10 the Atria properties were “unique” in that their purchase did not include a right to
11 display their photographs on the community website. Thus, Plaintiff’s argument
12 amounts to a claim that Defendant should have been aware of the risk that it was
13 infringing Plaintiff’s copyright, but was not. This would constitute negligent
14 infringement and is insufficient to sustain a finding of willfulness. *Kast*, 921 F.3d at
15 833–34.

16 Finally, Plaintiff argues that Defendant’s contention “conflicts with black letter
17 law explaining that copyright licenses are not assignable ‘absent express language to
18 the contrary.’” (PSGD ¶ 17 (quoting *Cincom Sys. v. Novelis Corp.*, 581 F.3d 431, 437
19 (6th Cir. 2009)).) The fact that Defendant was either ignorant of the law or adopted an
20 erroneous understanding about its right to use the disputed photographs may lead to a
21 finding that its conduct was not willful.³ Mistakes of law may be used as evidence of a
22 defendant’s lack of knowledge. *See Unicolors, Inc. v. H&M Hennes & Mauritz, L. P.*,
23 142 S. Ct. 941, 947 (2022) (interpreting multiple provisions of the Copyright Act to
24

25 ³ It is possible that Defendant obtained the “attendant rights, licenses, and/or
26 permissions to use the photos” of properties it purchased because the licenses to display
27 photographs of those properties generally authorize subsequent purchasers to continue
28 to use the photographs. (PSGD ¶ 17.) Viewing the evidence in the light most favorable
to Plaintiff, however, the Court assumes this is not the case.

1 conclude “the word ‘knowledge’ means actual, subjective awareness of both the facts
2 *and the law.*” (emphasis added).) Nor does it matter that Defendant was mistaken about
3 the law despite being a “sophisticated company . . . who has access to counsel and is”
4 in the business of “entering into complex acquisitions.” (Pl.’s Opp’n to Def.’s Mot. 7.)
5 For one thing, this argument is based on a negligence standard which, as discussed
6 above, is irrelevant to the willful infringement analysis. For another, the Ninth Circuit
7 rejected a similar argument in *VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 749 (9th
8 Cir. 2019) (“VHT’s argument that Zillow, a sophisticated business with a robust legal
9 team, should have known that its feed provider license agreements were invalid is
10 unavailing.”).

11 Defendant has presented evidence that when purchasing properties, it “always
12 received from [the seller] photos (including attendant rights, licenses, and/or
13 permissions to use the photos)” of the property. (PSGD ¶ 17.) Even if Defendant was
14 mistaken about its rights to use photographs following these purchases, a mistake of
15 law does not support a showing of willful infringement, and Plaintiff offers no evidence
16 that Defendant had actual knowledge of its mistaken interpretation. Thus, a reasonable
17 trier of fact could only conclude that before receiving the ImageRights email Defendant
18 had no reason to know or believe that using Atria’s “marketing material following the
19 purchase of a property” may have violated Plaintiff’s copyrights. (Def.’s Mot. 12.)

20 2. *Defendant’s Prompt Takedown of the Photos Identified in the*
21 *ImageRights Email Demonstrates a Lack of Willful Infringement*

22 Defendant argues that its prompt takedown of Plaintiff’s photos shows a lack of
23 willfulness. (Def.’s Mot. 12–15.) The Ninth Circuit has recognized that “[i]ntellectual
24 property rights are often disputed,” and “[t]o hold that willfulness must be inferred
25 whenever an alleged infringer uses an intellectual property in the face of disputed title
26 would turn every copyright claim into willful infringement and would improperly
27 discourage many legitimate, good faith transactions.” *Danjaq LLC v. Sony Corp.*, 263
28 F.3d 942, 959 (9th Cir. 2001). As a result, a defendant in a copyright action is entitled

1 to a reasonable period of time to investigate the legitimacy of infringement claims
2 before an inference of willfulness arises.

3 At the same time, the speed with which a defendant complies with a notice of
4 infringement does not always indicate innocuous conduct. On the one hand, a quick
5 takedown of infringing works could serve as evidence that a defendant was honestly
6 unaware it was infringing upon a copyrighted work and that it wanted to correct its good
7 faith error as expeditiously as possible. On the other hand, prompt remediation might
8 show that a defendant was attempting to get away with infringing activities, and only
9 acted quickly to mitigate further liability once its intentional, tortious conduct had been
10 exposed. Consequently, remedial action is probative of a defendant's lack of willful
11 infringement when it shows a defendant was surprised to learn that it had been
12 infringing the plaintiff's copyright and undertook a good faith effort to resolve the issue
13 in a reasonable time. *See New Line Cinema Corp. v. Russ Berrie & Co.*, 161 F. Supp.
14 2d 293, 300–01 (S.D.N.Y. 2001) (concluding infringement was not willful in part
15 because defendant promptly responded to plaintiff's cease-and-desist letter by asking
16 for more details).

17 Defendant produces evidence showing that, upon receiving the ImageRights
18 email, it immediately began investigating the veracity of the claims. The same day
19 Defendant received the ImageRights email, "Pacifica's marketing director Lucie
20 Punches forwarded the Image Rights [sic] email to Collin Foote, who works for
21 Pacifica's web designer G5, as Ms. Punches was unsure whether the email was spam or
22 if there were any issues with the website that G5 had designed." (PSGD ¶ 28.) After
23 Mr. Foote "recommended Pacifica's counsel take a look," (*id.* ¶ 29), "Ms. Punches
24 forwarded the email to Pacifica's in-house counsel," who then "forwarded it to Brian
25 Nord," (*id.* ¶ 30). "Mr. Nord looked into Image Rights [sic] and confirmed it was a
26 legitimate company, and recommended that Pacifica show its license or wait for more
27 official correspondence." (*Id.*) Following further internal discussions, (*id.* ¶ 31), "Ms.
28 Punches requested G5 remove the images from the websites" on April 12, 2021, (*id.*

¶ 32). This was followed by another email from Mr. Nord on April 19, 2021, directing G5 to remove the images and refrain from using them in any additional media. (*Id.* ¶ 36.) This entire process took just over three weeks.

A week later, on April 26, 2021, “Mr. Nord emailed Ms. Bringman,” stating, “I am told that the images have been removed now that we have notice of this matter. If that is not correct let me know and I will follow up with our marketing team.” (*Id.* ¶ 38 (internal quotation marks omitted).) The same day, Ms. Bringman acknowledged that it appeared the photographs were not displayed on the website but pointed out that the 16 photos were “still on the server for the website,” (*id.* ¶ 39 (internal quotation marks omitted)), and followed up the next week on May 3, 2021, to again recommend that the photos be removed from the server if Defendant had access, (*id.* ¶ 40). The same day as Ms. Bringman’s follow up email, “Mr. Nord confirmed that he had requested the photos be removed from the server but was unsure if Pacifica had control of that server.” (*Id.* ¶ 41.) The following week, Mr. Nord sent an email to Ms. Bringman stating that the “images should have all been removed,” to which Mr. Bringman replied, “I have reviewed the Pacifica site and it appears the images have been removed.” (Brown Decl. Ex. 4, at SHP000247.)

Defendant’s response to the ImageRights email leaves no doubt that it was genuinely surprised to be told it was infringing on Plaintiff’s copyright. Defendant’s employees initially expressed skepticism that it was infringing any copyright, (PSGD ¶¶ 28–29, 31), and began taking steps to investigate the veracity of ImageRights’ claim, (*id.* ¶¶ 28–31, 33). The investigation was conducted quickly and resulted in the removal of the photographs identified in the ImageRights email in a matter of weeks. Nothing in the record suggests that the investigation was made in bad faith or as a dilatory tactic to allow Defendant to continue displaying the disputed photographs. Given Ms. Bringman from ImageRights expressed “appreciat[ion]” for the fact that Defendant “acted promptly to remove the image[s],” (Brown Decl. Ex. 4, at SHP000246), no reasonable finder of fact could conclude that Defendant’s conduct was anything other

1 than a good faith effort to correct an honest mistake.

2 Defendant is therefore entitled to a determination that any infringement of the 16
3 disputed photographs identified in ImageRights' email was not willful.

4 3. *Defendant Is Not Entitled to Summary Judgment as to the*
5 *Remaining Disputed Photographs*

6 Although Defendant promptly removed the 16 disputed photographs identified
7 in the ImageRights email from its website, the record is considerably less developed
8 with respect to the remaining 27 disputed photographs. Defendant contends it "searched
9 its websites and took down 22 Photos not identified by Plaintiff." (Def.'s Reply 5
10 (emphasis removed).) This contention is not supported by any citation of the record,
11 and does not specify a date—or even an approximate timeframe—when these 22
12 disputed photographs were removed. Further, the 27 disputed photographs were on
13 Defendant's websites as of January 2022, more than nine months after the ImageRights
14 email, (Defendant's Statement of Genuine Disputes ("DSGD") ¶ 28, ECF No. 35-5),
15 and Defendant acknowledges that at least five of Plaintiff's photographs remained on
16 its website when the lawsuit was filed in September 2022. (See Def.'s Reply 5
17 (acknowledging that "the number of Photos on the websites had been whittled down to
18 five" by the time Plaintiff filed suit (internal quotation marks omitted))).

19 Defendant is not entitled to summary judgment on the issue of willfulness with
20 respect to these photographs because willfulness may be found where the defendant's
21 "actions were the result of reckless disregard for, or willful blindness to, the copyright
22 holder's rights." *Akanoc Sols., Inc.*, 658 F.3d at 944 (internal quotation marks omitted).
23 Plaintiff argues "that Defendant received actual notice by April 19, 2021 at the latest
24 that Atria had no authority to transfer the licenses to Plaintiff's Photos to Defendant."
25 (Pl.'s Opp'n to Def.'s Mot. 7 (emphasis removed).) The April 19, 2021 email from Ms.
26 Bringman only identifies the websites of two facilities on which Defendant displayed
27 the disputed photographs. (See Bringman Decl. Ex. A, at SHP000164, ECF No. 31-
28 18.) Whether the proffered licensing agreement (which is not included in any of the

1 exhibits to Ms. Bringman’s declaration) was sufficient to show Defendant had the
2 requisite knowledge to find willful infringement of the other disputed photographs is
3 therefore a question for the finder of fact. Additionally, the facts show that Defendant
4 did not remove the other disputed photographs from websites for *at least* nine months.
5 (DSGD ¶ 28.) A reasonable trier of fact could conclude from this long delay that
6 Defendant’s infringement of the 27 remaining disputed photographs was willful.

7 There is a genuine issue as to whether Defendant knew or had reason to suspect
8 it was using the remaining disputed photographs without proper permission during this
9 period. As a result, the Court cannot determine as a matter of law that Defendant did
10 not willfully infringe the 27 disputed photographs not identified in the ImageRights
11 email.

12 **B. Number of Works at Issue**

13 Defendant argues that it is entitled to a determination that the 43 disputed
14 photographs constitute no more than seven “works,” as that term is used in the
15 Copyright Act. (Def.’s Mot. 15–20.) The Copyright Act allows a plaintiff the option
16 of recovering “an award of statutory damages for all infringements involved in the
17 action, with respect to any one *work*, for which any one infringer is liable individually.”
18 17 U.S.C. § 504(c)(1) (emphasis added). Although the Copyright Act does not
19 specifically define the term “work,” it states that “all the parts of a *compilation* or
20 *derivative work* constitute one work.” *Id.* (emphasis added). In considering what
21 constitutes a “work” under the Copyright Act, “every circuit to address the issue has
22 held that separate copyrights are not distinct works unless they can live their own
23 copyright life.” *Columbia Pictures Indus., Inc. v. Krypton Broad. of Birmingham, Inc.*,
24 259 F.3d 1186, 1193 (9th Cir. 2001) (internal quotation marks omitted). As a result,
25 Defendant must show Plaintiff cannot carry his burden of demonstrating that each
26 disputed photograph “has an independent economic value and is, in itself, viable.” *Id.*
27 (internal quotation marks omitted). What constitutes a “work” is a question of law when
28 “there are no underlying factual disputes for the jury to resolve.” *Id.*

1 Defendant has not presented sufficient evidence from which the Court may
2 conclude as a matter of law that there are only seven works at issue in this case.
3 Defendant argues that “[a]ll 43 Photographs listed in the Complaint are registered in
4 one ‘group’” and that the Court should therefore conclude there are seven “‘works’
5 because the 43 Photographs were taken in groups in [seven] properties.” (Def.’s Mot.
6 15.) As an initial matter, the Court notes that Plaintiff did not register his work as a
7 series of “compilation[s],” 17 U.S.C. § 504(c)(1), but rather as a “Group of Published
8 Photographs.” (Registration Statements.) To the extent the registration label is
9 relevant, it cuts against Defendant’s argument because it suggests the disputed
10 photographs are not part of a “compilation.” 17 U.S.C. § 504(c)(1); *see Zillow*, 918
11 F.3d at 748 (“Though the registration label is not controlling, it may be considered by
12 the court when assessing whether a work is a compilation.”).

13 Next, Defendant unpersuasively argues that the holding in *Coogan v. Avnet, Inc.*,
14 No. CV040621PHXSRB, 2005 WL 2789311 (D. Ariz. Oct. 24, 2005), shows the
15 disputed photographs should be evaluated as seven “works.” (Def.’s Mot. 15–18.) The
16 plaintiff in *Coogan* was a photographer hired to take photographs of a company’s CEO.
17 *Id.* at *1. The plaintiff brought suit after the defendant used three of the photographs
18 without the plaintiff’s permission. *Id.* at *2. The plaintiff moved for summary
19 judgment, claiming that the three photographs were individual “works,” but the court
20 disagreed and concluded the case involved only one. *Id.* at *6. The court noted the
21 three “photographs were the subject of a single license agreement,” and “involved a
22 single subject, a single photographer and a single location.” *Id.* The Court also
23 recognized “there [was] no evidence in the record that Plaintiff marketed the images to
24 the public separately” because “the photographs were taken at a single session, by a
25 single photographer, for a single purpose.” *Id.*

26 The instant case is readily distinguishable from *Coogan*. While the disputed
27 photographs of the seven properties were subject to seven license agreements (one
28 license agreement for each property), (*see Atria Licenses*), the photographs of each

1 property did not concern a “single subject” at a “single location.” *Coogan*, 2005 WL
2 2789311, at *6. The disputed photographs depict *multiple* subjects (e.g., the pool, hair
3 salon, dining room, etc.) and were thus taken at *multiple* locations at each property.
4 Even to an individual without a background in photography, it is clear that the creative
5 considerations involved in each individual photograph—e.g., composition, lighting,
6 depth of field, contrast, shutter speed, etc.—would necessarily have been different at
7 each location within each property. Additionally, Plaintiff had to physically pick up
8 and move his camera to capture each feature of the individual property. Far from being
9 a series of snapshots of the same subject, each photograph is a unique creative
10 expression.

11 Further, unlike in *Coogan*, there is evidence that the images had independent
12 economic value. Defendant contends that “[e]ach individual photo had no value to
13 Atria, Pacifica, or anyone else.” (Def.’s Mot. 19.) This argument strains common sense
14 considering Atria and Defendant wanted to display the photographs “to entice
15 customers to view, visit, and potentially become residents” of its properties and “[t]he
16 only intended use of the Photographs was for Atria to market the properties.” (PSGD
17 ¶¶ 9–10.) Reasonable consumers may discount written descriptions in real estate
18 advertising as exaggerations or puffery. Prospective customers are thus more likely to
19 become future tenants if they can see for themselves that the pool is well maintained or
20 the dining room is sun-soaked and airy. It is difficult to believe that photographs of a
21 property’s pool, dining room, or hair salon would not each have independent value since
22 they would make an advertisement highlighting these features even more effective. In
23 essence, each disputed photograph is the practical manifestation of the adage that “a
24 picture is worth a thousand words,” and Plaintiff’s claim that “the invoices to Atria were
25 ultimately assessed and valued on a per-image basis” is entirely reasonable. (Pl.’s
26 Opp’n to Def.’s Mot. 11 (citing Hargis Decl. ¶ 7, ECF No. 36-1).) *Cf. Coogan*, 2005
27 WL 2789311, at *6 (finding “no evidence in the record that Plaintiff marketed the
28 images to the public separately”).

1 To the extent this case involves photographs “taken at a single session, by a single
2 photographer, for a single purpose,” *Coogan*, 2005 WL 2789311, at *6, the Court
3 respectfully declines to conclude that the photographs taken at each facility together
4 constitute a solitary work. Plaintiff initially granted Atria a license to use 61
5 photographs, but there are only 43 disputed photographs at issue in this case. (Pl.’s
6 Opp’n to Def.’s Mot. 12; *see also* Atria Invoices.) The fact that Atria did not display
7 all of the photographs supports Plaintiff’s contention that the “Photos could be exploited
8 on a piecemeal and individual basis and licensed in any number of ways apart from the
9 licensing arrangement agreed upon between Plaintiff and Atria.” (Pl.’s Opp’n to Def.’s
10 Mot. 12.)

11 Because there is a triable issue as to whether the photographs of each property
12 were “part[] of a compilation” or that they otherwise “constitute one work,” 17 U.S.C.
13 § 504(c)(1), Defendant’s motion for summary judgment on this issue is DENIED.

14 **C. Implied License**

15 Defendant argues that it possessed an implied license to use the disputed
16 photographs. (Def.’s Mot. 20.) Defendant’s argument is plainly without merit
17 considering the terms of the Atria Licenses expressly state they were “not transferrable”
18 and prohibited “[t]hird party usage.” (Atria Licenses) It should hardly be worth noting
19 that “no implied license may permit what a written license prohibits.” *Taylor Holland*
20 *LLC v. MVMT Watches, Inc.*, No. 2:15-cv-03578-SVW-JC, 2016 WL 6892097, at *6
21 (C.D. Cal. Aug. 11, 2016). Stated differently, “[a] sign stating ‘DO NOT ENTER’
22 simply cannot be construed as an implied right to enter.” (Pl.’s Opp’n to Def.’s Mot.
23 19.) Even Defendant “acknowledges that the invoices did not grant the right to Atria to
24 sublicense, and do not mention any rights to subsequent buyers of the property.” (Def.’s
25 Mot. 21.) Because the express licenses prevented anyone but Atria from using the
26 disputed photographs without Plaintiff’s consent, Defendant’s motion fails.

27 It is also irrelevant whether Defendant was ignorant of the licenses’ terms or
28 initially believed the licenses allowed Atria to sub-license the disputed photographs. A

1 determination as to whether there is an implied license turns on “the *licensor’s objective*
2 *intent* at the time of the creation and delivery of the” work, not the understanding of the
3 putative *licensee*. *Asset Mktg. Sys., Inc. v. Gagnon*, 542 F.3d 748, 756 (9th Cir. 2008)
4 (emphasis added). Plaintiff clearly intended to limit the license to Atria and to Atria
5 alone. Whether Defendant reasonably believed it obtained a license from Atria may be
6 relevant to the question of willfulness, but it has no bearing on whether there is an
7 implied license in this case. *See Bell v. Wilmott Storage Servs., LLC*, 12 F.4th 1065,
8 1081 (9th Cir. 2021) (“[C]opyright infringement is a strict liability tort.”).

9 Even if the express licenses did not obviously foreclose Defendant’s argument—
10 they do—there still would be no basis to conclude Defendant had an implied license to
11 use the disputed photographs. To determine whether a defendant has an implied license
12 to use a copyrighted work, courts in the Ninth Circuit use the test first recognized in
13 *Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir.1990). Under the *Effects*
14 *Associates* test, “an implied license is granted when (1) a person (the licensee) requests
15 the creation of a work, (2) the creator (the licensor) makes that particular work and
16 delivers it to the licensee who requested it, and (3) the licensor intends that the licensee-
17 requestor copy and distribute his work.” *Gagnon*, 542 F.3d at 754–55 (cleaned up).
18 None of these elements are satisfied here. Defendant did not request the creation of the
19 work, Plaintiff did not deliver the works to Defendant, and there is no evidence
20 suggesting Plaintiff intended that Defendant copy or distribute his work.

21 Relying on *Oliver v. Meow Wolf, Inc.*, No. 20-237 KK/SCY, 2022 WL 4132706,
22 at *19 (D.N.M. Sept. 12, 2022), Defendant urges the Court to adopt a strained reading
23 of the *Effects Associates* test and conclude that Atria’s “license vested in Pacifica upon”
24 the “purchase” of the properties. (Def.’s Mot. 21–22.) The plaintiff in *Oliver* was an
25 artist who had been asked to create a sculpture for “a permanent exhibition in Santa Fe,
26 New Mexico.” *Oliver*, 2022 WL 4132706, at *2. Although the defendant had merged
27 with one of the entities that was managing the exhibition when the sculpture was first
28 installed, the defendant had not originally commissioned the work, and plaintiff brought

1 suit claiming the defendant was therefore violating her copyright in the sculpture. *Id.*
2 at *13.

3 Recognizing that “[t]he touchstone for finding an implied license, according to
4 the *Effects Associates* framework, is intent,” the court concluded that the plaintiff
5 intended for the implied license to vest in the installation’s “operators for the first ten
6 years of the exhibit’s operation,” whoever those operators may be. *Id.* at *17–18
7 (cleaned up). The court noted that the plaintiff had been asked to construct an art
8 installation that was “going to be up for 10 years,” *id.* at *12 (internal quotation marks
9 omitted), and that she did not object to the defendant’s display of her copyrighted work
10 until many years after the defendant had merged with the entity that had been running
11 the exhibition, *id.* at *18. Perhaps most importantly, the court recognized the case
12 involved “the initial grant of an implied license to two licensees and the subsequent
13 merger of one of these licensees into a survivor, with the predecessor’s rights vesting in
14 the survivor by operation of law.” *Id.* at *19 (citing N.M. Stat. Ann. § 53-19-62.2(A)(2),
15 (3), (5) (New Mexico law regarding the effect of conversions and mergers)).

16 The facts of this case are readily distinguishable from *Oliver*. First, “*Oliver* did
17 not involve an express license agreement that stated in no uncertain terms that the
18 license could not be transferred.” (Pl.’s Opp’n to Def.’s Mot. 19.) Second, even
19 accepting Defendant’s contention that “Plaintiff licensed the Photographs to Atria with
20 the knowledge and understanding that Atria would display the Photographs on its
21 websites for marketing” purposes, (Def.’s Mot. 22 (citing PSGD ¶ 9),⁴ the strict
22 limitations of the licensing agreements belie any conclusion that Plaintiff intended that
23 the license extend to any entity other than Atria, (see Atria Invoices (“License is not
24 _____

25 ⁴ The Court is dubious that the cited paragraph supports the inference that Plaintiff knew
26 the photographs would be used for a specific purpose. The paragraph does not discuss
27 what Plaintiff knew, (PSGD ¶ 9), and in the very next paragraph, Plaintiff disputes that
28 “[t]he only intended use of the Photographs was for Atria to market the properties,” (*id.*
¶ 10).

1 transferrable. Third-party usage . . . is not granted with this license.”)). Third, unlike
2 in *Oliver*, Plaintiff did not wait for years to object to Defendant’s use of his photographs.
3 Defendant purchased the properties from Atria in 2020 and 2021, (PSGD ¶ 14), and
4 Plaintiff objected to the use of the disputed photographs on March 30, 2021, (*id.* ¶ 27),
5 and filed suit in September of 2022, (Compl.). Finally, this case does not involve a
6 merger of two entities with a single survivor, but rather a sale of real property from one
7 company to another. As a result, Defendant fails to explain how Atria’s license could
8 vest in the subsequent owner of the property “by operation of law.” *Oliver*, 2022 WL
9 4132706, at *19.

10 Defendant has presented no evidence that it possessed an implied license to use
11 Plaintiff’s photographs. Accordingly, its motion for summary judgment on this issue is
12 DENIED.

13 **D. Conclusion**

14 Defendant’s motion for summary judgment is GRANTED in part and DENIED
15 in part. No reasonable juror could determine that Defendant willfully infringed the 16
16 photographs identified in the ImageRights email. Defendant is not entitled to summary
17 judgment on any other issue presented in its motion.

18 **V. PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

19 **A. Copyright Infringement**

20 “To establish a prima facie case of copyright infringement, a plaintiff must show
21 (1) ownership of a valid copyright and (2) violation by the alleged infringer of at least
22 one of the exclusive rights granted to copyright owners by the Copyright Act.” *UMG*
23 *Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1178 (9th Cir. 2011). The Copyright Act
24 “establishes the exclusive rights vested in the owner of a copyrighted work, including
25 the exclusive rights to reproduce the work, prepare derivative works, distribute copies
26 of the work to the public, and to perform or display the work publicly.” *Firoozye v.*
27 *Earthlink Network*, 153 F. Supp. 2d 1115, 1125 n.6 (N.D. Cal. 2001) (citing 17 U.S.C.
28 § 106).

1 1. *Plaintiff Has Presented Evidence Establishing Ownership of a Valid*
2 *Copyright for 41 of the 43 Disputed Photographs*

3 The record includes copies of two registration statements from 2018 and 2019
4 identifying Plaintiff as the owner of the copyrights for the images listed in the
5 statements. (Naylor Decl. ¶ 6, ECF No 31-12; Registration Statements.) These
6 Registration Statements constitute prima facie evidence of Plaintiff's ownership of a
7 valid copyright for the works identified. *See* 17 U.S.C. § 410(c) ("In any judicial
8 proceedings the certificate of a registration made before or within five years after first
9 publication of the work shall constitute prima facie evidence of the validity of the
10 copyright and of the facts stated in the certificate."). "A certificate of copyright
11 registration, therefore, shifts to the defendant the burden to prove the invalidity of the
12 plaintiff's copyrights. "An accused infringer can rebut this presumption of validity" by
13 offering "evidence or proof to dispute or deny the plaintiff's prima facie case of
14 infringement." *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000)
15 (internal quotation marks omitted).

16 Defendant does not claim that any of the works listed in the Registration
17 Statements lack a valid copyright but instead argues that Plaintiff has failed to show that
18 several of the disputed photographs are covered by the Registration Statements. (Def.'s
19 Opp'n to Pl.'s Mot. 6–9.) Specifically, Defendant claims "the eight images that appear
20 on the Hargis/Atria Rancho Penasquitos invoice do not clearly appear on the copyright
21 registrations." (*Id.* at 8.) Defendant argues "[t]he images Plaintiff took for the Rancho
22 Penasquitos location and licensed to Atria are titled: 'hargis_180622_8072;
23 hargis_180622_8090; hargis_180622_8100; hargis_180622_8117;
24 hargis_180622_8152; hargis_180622_8178; hargis_180622_8206;
25 hargis_180622_8226' and 'retouching hargis_180622_8100.'" (*Id.* at 8–9 (citing Atria
26 Invoices).) Defendant points out that the July 2018 photographs listed on the
27 Registration Statements include: "Atria_Rancho_Penasquitos8206,
28 Atria_Rancho_Penasquitos8226-2, Atria_Rancho_Penasquitos8178, Atria_Rancho

1 Penasquitos8152, Atria_Rancho_Penasquitos8090, Atria_Rancho Penasquitos8117,
2 [and] Atria_Rancho_Penasquitos8072.” (*Id.* at 9 (citing Registration Statements)
3 (errors preserved).)

4 The slight variation in naming conventions in this case does not give rise to a
5 triable issue of fact sufficient to preclude summary judgment as to ownership. The four
6 terminal digits in both the Registration Statements and Atria Invoices are easily
7 matchable, a fact that Defendant acknowledges in its opposition to Plaintiff’s motion.
8 (*See* Def.’s Opp’n to Pl.’s Mot. 9.) Further, dates identified in the Atria Invoices
9 correspond with those in the Registration Statements. For example, the invoice for the
10 Rancho Penasquitos location lists “8 images” and a date of “6/22/18.” (Atria Invoices.)
11 The Registration Statements identify eight images with identical terminal digits, seven
12 of which use the name “Atria_Rancho_Penasquitos.” (Registration Statements
13 SHP000141.) Each of these photographs were “published” in “July 2018,” or a little
14 over a week after the date identified in the invoice. (*Id.*) Both the Registration
15 Statements and Atria Invoices were created years before this lawsuit arose, and there is
16 absolutely no reason to conclude the similarities were manufactured to support
17 Plaintiff’s claims. Ultimately, the prospect that the similarities between the documents
18 are a product of sheer coincidence is simply too incredible for any rational juror to
19 believe.

20 Defendant also claims Plaintiff failed to establish proof of ownership of two of
21 the disputed photographs because “[t]here is no photo ending in ‘8100’ or ‘8226’” in
22 the Registration Statements. (Def.’s Opp’n to Pl.’s Mot 9.) The Court is unsure how
23 Defendant reaches this conclusion with respect to the “8100” photograph, as there is a
24 photograph identified as “hargis_180622_8100” in both the Registration Statements
25 and the Atria Invoices. (Registration Statements SHP000141; Atria Invoices
26 SHP000006.) Defendant’s argument with respect to the “8226” photo, however, is on
27 stronger footing. There is a photograph identified as Atria_Rancho_Penasquitos8226-
28 2 in the Registration Statements, but the Atria Invoices only identify an image titled

1 “hargis_180622_8226.” (Registration Statements SHP000141; Atria Invoices
2 SHP000006.) Plaintiff’s supplementary declaration asserts that “[t]he appearance of ‘-
3 2’ at the end of the file name denotes that there are multiple versions of the same image”
4 and “that ‘hargis_180622_8226,’ as set forth in the invoice, is in fact the same image as
5 ‘Atria_Rancho_Penasquitos8226-2,’” identified in the Registration Statements. (Suppl.
6 Hargis Decl. ¶ 14, ECF No. 38-3.) Although Plaintiff’s explanation is plausible, a
7 reasonable juror viewing the evidence in the light most favorable to the Defendant might
8 discount the explanation and infer that the “-2” designation signals that the registered
9 photograph is distinct from the one identified in the invoices. Accordingly, the Court
10 cannot conclude that “Atria_Rancho_Penasquitos8226-2” and “hargis_180622_8226”
11 represent the same image.

12 Finally, Defendant argues that the disputed photograph of the Atria Burlingame
13 location was “published in 2014 [and] therefore does not and cannot appear on the”
14 Registration Statements, which were filed in 2018 and 2019. (Def.’s Opp’n to Pl.’s
15 Mot. 7.) Plaintiff acknowledges this photograph is not included in the Registration
16 Statements, and has accordingly withdrawn “his claim as to this Photo for purposes of
17 his summary judgment motion.” (Pl.’s Reply 2–3.)

18 Viewing the evidence in the light most favorable to Defendant, the Court
19 concludes that Plaintiff has established ownership of a valid copyright for 41 of the 43
20 disputed photographs. Plaintiff has not presented sufficient evidence to establish
21 ownership of a valid copyright for the disputed photograph of the Atria Burlingame
22 location, and the photograph identified as “hargis_180622_8226” in the Atria Invoices.

23 2. *Defendant Violated Plaintiff’s Exclusive Rights Under the*
24 *Copyright Act*

25 As stated above, the Copyright Act “establishes the exclusive rights vested in the
26 owner of a copyrighted work, including the exclusive rights to reproduce the work,
27 prepare derivative works, distribute copies of the work to the public, and to perform or
28 display the work publicly.” *Firoozye*, 153 F. Supp. 2d at 1126 n.6 (citing 17 U.S.C.

1 § 106). In the context of copyright disputes, “[t]he word ‘copying’ is shorthand for the
2 infringing of any of the copyright owner’s five exclusive rights.” *S.O.S., Inc. v. Payday,*
3 *Inc.*, 886 F.2d 1081, 1085 n.3 (9th Cir. 1989). “In the absence of direct evidence of
4 copying, . . . the plaintiff can attempt to prove it circumstantially by showing that the
5 defendant had access to the plaintiff’s work and that the two works share similarities
6 probative of copying.” *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020)
7 (internal quotation marks omitted).

8 Here, Plaintiff has provided direct evidence of copying. Defendant does not
9 dispute that 16 of Plaintiff’s photos “had been reproduced, distributed, and publicly
10 displayed, on two websites that Defendant owns, operates, and/or controls.” (DSGD
11 ¶ 13.) Nor does Defendant dispute that as of January 2022, another set of 27 of
12 Plaintiff’s photographs were discovered on “websites in connection with the Encinitas,
13 Chula Vista, San Diego, Burlingame, and Sterling locations.” (*Id.* ¶ 28.) Finally,
14 Defendant does not dispute that at least five of the 27 disputed photographs “were on
15 Defendant’s website as of September 27, 2022. (*Id.* ¶ 30.)

16 Rather than claim it did not copy the disputed photographs, Defendant argues that
17 it obtained an implied license to use them. (Def.’s Opp’n to Pl.’s Mot. 10–11.)
18 Defendant’s argument is without merit. Even drawing all inferences in favor of
19 Defendant, the Court’s analysis with respect to this issue remains the same as it was in
20 the context of Defendant’s motion for summary judgment. Defendant again relies on
21 *Oliver v. Meow Wolf, Inc.* to argue “[w]hen a party displays a copyrighted work in the
22 same way the licensee displayed the work, and that display ‘falls within the original
23 scope of the license,’ the license can vest in the second party.” (Def.’s Opp’n to Pl.’s
24 Mot. 10 (quoting *Oliver*, 2022 WL 4132706, at *19).) The evidence in this case shows
25 that Defendant’s use of the disputed photographs clearly exceeded “the original scope
26 of the license,” *Oliver*, 2022 WL 4132706, at *19, since the licenses were “not
27 transferable” and expressly prohibited “[t]hird-party usage,” (Atria Licenses). Further,
28 as noted in *Oliver*, “[t]he touchstone for finding an implied license, according to the

1 *Effects Associates* framework, is intent,” *id.* at *18 (cleaned up), and the undisputed
2 evidence shows Plaintiff intended to license the disputed photographs only to Atria, (*see*
3 *generally* Atria Licenses).

4 3. Conclusion

5 Plaintiff has presented sufficient evidence establishing ownership of the
6 copyright in 41 of the 43 disputed photographs. Plaintiff has also established that
7 Defendant “does not have enough evidence of an essential element of its . . . defense
8 [i.e., that it obtained implied license] to carry its ultimate burden of persuasion at trial.”
9 *Fritz Cos., Inc.*, 210 F.3d at 1106. Accordingly, Plaintiff’s motion for summary
10 judgment as to Defendant’s infringement is GRANTED with respect to all of the
11 disputed photographs except for the photograph of the Atria Burlingame location and
12 the photograph identified as “hargis_180622_8226” in the Atria Invoices.

13 B. Innocent Infringement

14 Plaintiff moves for summary judgment that “Defendant’s ‘innocent
15 infringement’ defense is precluded as a matter of law” because “[e]ach of the Photos
16 provided to Atria, and which were subsequently provided to Pacifica, featured a
17 copyright notice, ‘© 2018 Scott Hargis Photo’ in the metadata embedded therewith.”⁵
18 (*Id.* at 11.) To prove innocent infringement, a defendant must show that it was “not
19 aware and had no reason to believe that [its] acts constituted an infringement of
20 copyright.” 17 U.S.C. § 504(c)(2). If a copyrighted work includes a notice of copyright
21 placed in a “manner and location as to give reasonable notice of the claim of copyright,”
22 then “no weight shall be given to . . . a defendant’s interposition of a defense based on
23 innocent infringement in mitigation of actual or statutory damages.” 17 U.S.C.
24 § 401(c)–(d).

25
26 ⁵ Although Defendant claims “[i]t is unclear if Plaintiff is moving for summary
27 judgment on said defenses or how these arguments relate to Plaintiff’s motion as to
28 liability and willfulness,” it provided a response in its opposition brief. (Def.’s Opp’n
to Pl.’s Mot. 11–12.)

1 Plaintiff cites no authority supporting the proposition that a copyright notice
2 contained in a photograph's metadata is affixed to the work in "manner and location as
3 to give reasonable notice of the claim of copyright," nor has the Court's research
4 uncovered one. *Id.* § 401(c). Further, even crediting Plaintiff's claims that he provided
5 the copyright notice in the metadata when the disputed photographs were transferred to
6 Atria, (DSGD ¶ 11); there is a factual question as to whether the data survived the
7 transfer of the photographs from Atria to Defendant, (*id.*; Def.'s Additional Material
8 Facts ¶ 6, ECF No. 35-6).

9 Viewing all facts in the light most favorable to Defendant, Plaintiff has not shown
10 that Defendant received the copyright notice in a manner that precludes a finding of
11 innocent infringement. Accordingly, Plaintiff's motion for summary judgment that
12 Defendant's defense of "innocent infringement" is precluded pursuant to 17 U.S.C.
13 § 401 is DENIED.

14 **C. Willful Infringement**

15 Plaintiff claims he is entitled to summary judgment that Defendant's
16 infringement was willful because "an infringer's failure to conduct a modicum of due
17 diligence into a copyright holders' rights, as is the case here, evinces willful
18 infringement." (Pl.'s Mot. 12–13.)

19 1. *Defendant Did Not Willfully Infringe the 16 Photographs Identified* 20 *in the ImageRights Email*

21 As discussed above in the context of Defendant's motion for summary judgment,
22 even viewing the evidence in the light most favorable to Plaintiff, no reasonable juror
23 could conclude that Defendant willfully infringed the 16 photographs identified in the
24 ImageRights email. Viewing the same evidence in the light most favorable to
25 Defendant, it should be clear that no reasonable juror could determine Defendant's
26 conduct amounted to willful blindness or reckless disregard for Plaintiff's rights.

27 ///

28 ///

2. *Plaintiff Has Shown That Defendant Willfully Infringed Five of the
27 Photographs in the “Second Infringing Set”*

With respect to the disputed photographs not identified in the ImageRights email, Plaintiff claims to have discovered a “Second Infringing Set” of 27 disputed photographs on Defendant’s website in January 2022. (DSGD ¶ 28.) There is a dispute as to whether Defendant received actual notice that Defendant lacked a right to display these photographs. Plaintiff claims he “repeatedly attempted to resolve his claims with Defendant short of litigation” but that Defendant “ignored his efforts.” (DSGD ¶ 29.) Defendant claims that “Plaintiff did not inform Pacifica of the ‘Second Infringing Set’” of disputed photographs. (*Id.*) Because Plaintiff cites no evidence that he informed Defendant that the “Second Infringing Set” of disputed photographs was displayed on its website, he has failed to show that Defendant had actual notice it was infringing on Plaintiff’s rights in these photos.

However, willful infringement may arise even without actual notice, and Plaintiff argues that Defendant willfully infringed the disputed photographs in the “Second Infringing Set” because following the ImageRights email it stuck “its head in the sand, continuing to exploit over two dozen additional of Plaintiff’s copyright[ed] works, without once stopping to inquire whether it obtained the necessary rights.” (Pl.’s Mot. 15.) This argument is borne out by the fact that by the time this lawsuit was filed, Defendant had removed some of the disputed photographs from its websites but continued to display photographs of the Sterling property. (Def.’s Opp’n to Pl.’s Mot. 15; *see also* DSGD ¶ 30.) This shows that, in the instances where Defendant actually took steps to determine whether it had a right to display photographs of Atria properties, it repeatedly concluded there was reason to believe it did not.

Consequently, at some point before this lawsuit was filed, Defendant had to have been aware that there was a “substantial and unjustified risk” it was using photographs of the Atria properties without proper authorization. *Kast*, 921 F.3d at 833 (internal quotation marks omitted). If Defendant is to be believed, the fact that the purchase of

1 one Atria property did not include the attendant rights to use photographs of that
2 property was a significant aberration from what was “expected and common in the
3 industry.” (Def.’s Opp’n to Pl.’s Mot 13; DSGD ¶ 18.) By the time the lawsuit was
4 filed, however, Defendant had discovered the same unusual issue had arisen in the
5 purchase of at least *five other Atria properties*. (Def.’s Opp’n to Pl.’s Mot. 15.) Stated
6 differently, when this lawsuit commenced, Defendant had actual knowledge that the
7 *same issue* had arisen *multiple times* across properties purchased from the *same seller*.
8 Defendant’s decision to remove 22 of the remaining disputed photographs from its
9 websites is further evidence that by the time this lawsuit commenced, it had reason to
10 suspect it lacked a right to use the disputed photographs. In light of the pattern of
11 “unique” licensing issues associated with the Atria properties, a reasonable trier of fact
12 would be left with one conclusion: Defendant was aware it had a reason to “investigate
13 or attempt to determine whether” the photographs of the Sterling property was “subject
14 to copyright protections,” but it failed to do so. *Unicolors, Inc.*, 853 F.3d at 992.
15 Consequently, the only reasonable conclusion to draw from these facts is that
16 Defendant’s “actions were the result of ‘reckless disregard’ for, or ‘willful blindness’
17 to, the copyright holder’s rights.” *Akanoc Sols., Inc.*, 658 F.3d at 944.

18 Defendant unpersuasively argues that its conduct is analogous to the defendant’s
19 in *Zillow*, 918 F.3d 723. (Def.’s Opp’n to Pl.’s Mot. 16.) In that case, the Ninth Circuit
20 noted that the “continued use of a work even after one has been notified of his or her
21 alleged infringement does not constitute willfulness so long as one believes reasonably,
22 and in good faith, that he or she is not infringing.” *Zillow*, 918 F.3d at 748 (cleaned
23 up). The court also concluded “that substantial evidence [did] not show Zillow was
24 ‘actually aware’ of its infringing activity,” and that “Zillow’s belief that feed providers
25 had properly licensed its uses and that its system effectively respected those rights was
26 reasonable.” *Id.* at 749. Unlike the defendant in *Zillow*, however, Defendant could not
27 possibly have maintained a *reasonable* belief that it had a right to use Plaintiff’s
28 photographs by the time the suit was filed. Defendant’s argument that it possessed an

1 *implied* license is flatly contradicted by the terms of the *express* licenses. Further, its
2 own conduct shows that it recognized the need to remove the disputed photographs from
3 the websites of at least six other Atria properties by the time the suit was filed. As a
4 result, summary judgment is appropriate with respect to the five disputed photographs
5 of the Sterling property.

6 As to the remaining 22 disputed photographs, the exact moment when Defendant
7 had reason to suspect it lacked the rights to use the “Second Infringing Set” of disputed
8 photographs is a question of fact that cannot be resolved on summary judgment. A
9 reasonable trier of fact could conclude that as soon as Defendant discovered it lacked
10 the rights to use the disputed photographs at a single facility, it would have been aware
11 “of a substantial and unjustified risk” it was infringing the copyrights of photographs of
12 other facilities. *Kast*, 921 F.3d at 833 (internal quotation marks omitted). Others may
13 reasonably conclude that it was only after discovering a pattern of issues that Defendant
14 was aware of the risk. What is more, if Defendant needed to perceive a pattern before
15 its conduct constituted willful blindness or a reckless disregard for Plaintiff’s rights, the
16 record does not contain enough information to determine when this pattern was
17 discovered. (*See* Def.’s Opp’n to Pl.’s Mot. 15 (stating Defendant took “down all
18 images from the six California locations it purchased from Atria” without providing a
19 date).) As a result, there is no way to determine on this motion the time at which
20 Defendant first had sufficient notice to justify a finding of willful infringement.

21 Although it is clear that Defendant was aware of the “substantial and unjustified
22 risk” of infringement by the time Plaintiff filed suit, *Kast*, 921 F.3d 822, 833 (internal
23 quotation marks omitted), the Court cannot conclude that Plaintiff is entitled to
24 summary judgment that Defendant willfully infringed the remaining 22 disputed
25 photographs.

26 **D. Conclusion**

27 Plaintiff’s motion is GRANTED in part and DENIED in part.

28 Plaintiff has established that he owns a valid copyright in 41 of the 43 disputed

1 photographs. Plaintiff has also presented sufficient evidence to show that Defendant
2 infringed on at least one of his rights under the Copyright Act. Accordingly, Plaintiff's
3 motion for summary judgment as to infringement is GRANTED with respect to the 41
4 disputed photographs for which Plaintiff has supplied proof that he owns a valid
5 copyright.

6 Plaintiff is not entitled to a determination that Defendant willfully infringed 38
7 of the 43 disputed photographs. However, Plaintiff has presented sufficient evidence
8 showing Defendant's infringement of the five disputed photographs of the Sterling
9 location was willful. Accordingly, Plaintiff's motion is GRANTED with respect to the
10 five disputed photographs of the Sterling location and DENIED as to all remaining
11 disputed photographs.

12 **VI. DEFENSE COUNSEL'S MOTION TO WITHDRAW**

13 "An attorney may not withdraw as counsel except by leave of court. A motion
14 for leave to withdraw must be made upon written notice given reasonably in advance to
15 the client and to all other parties who have appeared in the action." C.D. Cal. R. 83-
16 2.3.2. "An attorney requesting leave to withdraw from representation of an organization
17 of any kind (including corporations, limited liability corporations, partnerships, limited
18 liability partnerships, unincorporated associations, trusts) must give written notice to
19 the organization of the consequences of its inability to appear pro se." *Id.* 83-2.3.4.
20 Finally, "[u]nless good cause is shown and the ends of justice require, no substitution
21 or relief of attorney will be approved that will cause delay in prosecution of the case to
22 completion." *Id.* 83-2.3.5.

23 Although GRSM gave Defendant "adequate notice of their intention to move to
24 withdraw from this case," (Withdrawal Mot. 2), there is no evidence that they provided
25 "written notice to the organization of the consequences of its inability to appear pro se,"
26 C.D. Cal R. 83-2.3.4. Further, because Defendant is a corporation and therefore cannot
27 proceed pro se, proceedings will stop until new counsel has been retained. As a result,
28 withdrawal is likely to cause significant delay, especially given the imminence of trial.

1 Accordingly, the motion is denied without prejudice to renewal.⁶ If Defendant
2 retains new counsel before a hearing on any renewed motion by GRSM, it may submit
3 a Request for Approval of Substitution or Withdrawal of Counsel (Form G-01).

4 **VII. CONCLUSION**

5 **Defendant shall submit declarations substantiating the Brown declaration's**
6 **exhibits within seven days of the date of this Order. Failure to comply with this order**
7 **will result in the imposition of financial and/or terminating sanctions.**

8 Defendant's motion for summary judgment is GRANTED in part and DENIED
9 in part. The Court determines that as a matter of law any infringement of the 16
10 photographs identified in the ImageRights email was not willful. Factual disputes
11 preclude the Court from determining whether any infringement of the remaining 27
12 photographs was willful. Defendant's motion for a determination that there are only
13 seven "works" in this case and that it obtained an implied license is DENIED.

14 //

15 ///

16 ///

27 ⁶ The Court authorizes any renewed motion to be set for hearing after the motion hearing
28 cut-off but no later than September 25, 2023.

1 Plaintiff's motion for summary judgment is GRANTED in part and DENIED in
2 part. The Court determines as a matter of law that Defendant does not possess an
3 implied license to use any of the photographs, that Defendant infringed on Plaintiff's
4 copyright of the 41 disputed photographs for which Plaintiff has provided proof that he
5 owns a valid copyright, and that Defendant willfully infringed the five disputed
6 photographs of the Sterling location. Plaintiff is not entitled to summary judgment that
7 Defendant's innocent infringement defense is precluded under 17 U.S.C. § 504(c)(2),
8 or that Defendant willfully infringed 22 of the 27 disputed photographs in the Second
9 Infringing Set.

10 Defendant's counsel's motion to withdraw is DENIED.

11
12 **IT IS SO ORDERED.**

13
14 Dated: August 2, 2023


MARK C. SCARSI
UNITED STATES DISTRICT JUDGE